



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 43 OF 2014

REPUBLIC

Versus

JULIUS KARITHI M'MUBWANGA.....ACCUSED

JUDGMENT

Murder

[1] The accused person, Julius Karithi M'Mubwanga was charged with murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 laws of Kenya. Particulars of the offence were that; the accused, on 3rd day of May, 2014 at Ndunyu village, Naathu location, Igembe North sub County within Meru County, murdered Richard M'Mauta M'Mwenda. The prosecution called 6 witnesses. The defence called only the accused. Their testimonies were recorded verbatim and are part of record.

Elements of murder

[2] To secure a conviction for murder, the prosecution must prove beyond any reasonable doubt the following:-

- 1. The death of the deceased and cause of death;***
- 2. That the accused caused the unlawful act or omission which caused the death; and***
- 3. That the accused had malice aforethought as defined under section 206 of the Penal Code.***

[3] Instances of malice aforethought are stated in Section 206 of the Penal Code as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- (c) an intent to commit a felony;***
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

The death of deceased and cause of death

[4] The deceased died on 2nd May 2014. His body was identified for purposes of post-mortem by PW4, Amos Kiramburu Mwenda. According to the post-mortem report prepared and signed on 3rd June 2014 by Dr. Lucy Muchiri, the cause of death of the deceased was

multiple injuries (head and thoracic injury) due to blunt force trauma. PW 3, Dr. Scholastica Kimani works at Meru Teaching and Referral Hospital produced the said post-mortem on behalf of Dr. Lucy Muchiri with whom she worked for 4 years at Kenyatta National Hospital for 4 years during her post graduate training. She knew her handwriting and signature. Accordingly the death of the deceased and cause of death has been proved beyond any doubt.

Did the accused cause the unlawful act or omission which caused the death?

[5] PW1, Lucy Nkatha told the court that she had gone to cut grass at Mzee Julius M'Anari's shamba on 17th April 2014. On her way back, she met the accused person. The accused started to accuse her of stealing grass from his shamba and he started to chase her with a panga. She screamed for help as she ran to M'Anari's home. She ran to where Mzee M'Anari was and tried to shield herself. The accused continued to pursue her and so she decided to take cover and entered into M'Anari's house. Her husband heard her screams and came to the scene. The accused started to cut her husband several times on the head and hand. She came out of the house and saw what happened. She also stated that M'Anari was also there and saw all that happened. Her husband fell down and was unconscious. They then took him to Meru hospital and later transferred to Kenyatta Hospital where he died. She stated that the accused is their neighbour but there was no quarrel between the accused and the deceased or their respective families before this incident.

[6] In cross-examination, she confirmed her evidence in chief but added that the accused had a panga and when he accused her of stealing his grass she was gripped by fear, dropped the grass she was carrying and started to run away. The accused hit her with the side of the panga and she ran as fast as she could and shielded herself behind M'Anari. She told the court that the accused threatened to cut even Mzee M'Anari. She said that her husband was carrying a fimbo but he did not use it on the accused. She stated that her husband did not fight the accused at all.

[7] PW2, Cyrus M'Anari corroborated the evidence of PW1 that on 17th April 2014, the accused came chasing after PW1. PW1 was screaming. He beseeched the accused not to beat her but he hit her at the back. PW1 ran into his house. The accused pursued her and even hit his door with a panga two times. The deceased came just after PW1 had shielded herself in his house. The accused then cut the deceased on the elbow. PW2 beseeched him to stop it but he cut him again on the head. The deceased fell down. The accused also threatened to cut PW2 forcing him to take cover behind a tree. He also decided to seek for more help elsewhere. He screamed and people came. The deceased lay on the ground and looked dead. He was lifeless and they believed he was dead and so heaved him on a car and took him to hospital at Meru. Meru Hospital could not treat him for the injuries were serious and he was referred to Kenyatta National Hospital. He heard after two days he died. He recorded statement with the police. The deceased was his nephew.

[9] In cross-examination, he stated that the deceased did not carry any weapon. He only carried a small stick when he came and he did not hit the accused at all. He confirmed that he was barely a metre from the scene when the accused was cutting the deceased.

[10] PW5 on receiving report from his sub-area mobilized a search for the suspect. The members of the public wanted to burn his house but he intervened. He had him arrested on 18th April 2014 despite him being on the run. PW6 was the Investigations officer. He received report of the incident from PW1 on 18th April 2014. The accused was also arrested and put into the cells. He stated in cross-examination that he saw the accused when he was brought to the police and he did not see any injuries on him. He acted swiftly and visited the scene on 20th April 2014 where he observed blood on the ground. There were cut iron sheets at the scene. He charged him with a holding charge of causing grievous bodily harm at Maua court. Later, he was given information that the deceased had died and he carried out further investigation and preferred murder charges.

[11] The accused testified as DW1. He stated that on 17th April 2014, he found PW1 cutting grass from his shamba. When she saw him, she ran away to M'Anari's house. Then, her husband came with a panga and started cutting him on the head and the right hand as well as ribs. He approached from behind. He realized that he will be killed and so he tried to defend himself with a panga he was holding. He cut the deceased on the head and hand and he fell down. He said that he also went to hospital for treatment. He said that he did not plan to kill the deceased.

[20] In cross-examination he stated that did not pursue PW1 to or enter the home of M'Anari. But at another time he stated that they fought with the deceased at M'Anari's home for two hours. He said that the deceased came to M'Anari's home in response to the screams of his wife. He also said that he did not know that he would injure the deceased in the fight.

[21] The evidence of PW1 and PW2 was consistent that the accused cut the deceased with a panga on the head and hand. The accused also confirmed that he cut the deceased on the hand and head and he fell down. The Post-mortem report produced by PW3 show that the cause of death of the deceased was multiple injuries (head and thoracic injury) due to blunt force trauma. The injuries were multiple injuries on the scalp, iliac region, elbow region, left temporal region of the scalp, frontal region of the scalp, and right forearm. These injuries were inflicted by the accused. Therefore, there is proof beyond reasonable doubt that the accused caused the unlawful act that caused the death of the deceased.

Did he do it with malice aforethought?

[23] DW1 stated that the deceased attacked him with a panga and he defended himself with the panga he was holding. This is a defence of self-defence. In the case of **TEI S/O KABAYA vs. REPUBLIC [1961] EA** the court held:-

“In consideration whether the defence of provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.”

[24] Section 17 of the Penal Code is useful in relation to defence of a person or property and provides that:

“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of

force in the defence of person or property shall be determined according to the principles of English Common Law.”

[25] What are these common law principles on self-defence? This question was asked and answered by the Court of Appeal in the case of **MOHAMMED OMAR & 5 OTHERS [2014] eKLR** as follows:

*“What are the common law principles relating to self-defence? The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in **PALMER VS R [1971] AC 818**. The decision was approved and followed by the Court of Appeal in **R VS McINNES, 55 Lord Morris, delivering the judgment of the Board, said:***

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

Applying the principles

[26] The Accused stated that he was attacked by the deceased with a panga from behind and after he had been cut severally he realized that he would be killed and so he defended himself by cutting the deceased on the head and hands. The evidence of PW1 and PW2 was that the deceased carried only a fimbo. The said evidence is cogent and believable. It is from eye witnesses and was not controverted at all. I find that the deceased was not armed with a panga as claimed by the accused. The accused’s claim that he was attacked by the deceased with a panga, cut with a panga and was injured is not supported by evidence. There is no evidence of any attack by the deceased with a panga. Evidence show that the deceased carried a fimbo or small stick and that he did not use it on the accused. Even if the deceased could have attacked the accused with the small fimbo- which is not the case here- still such would be a minor attack that does not warrant such retaliation that is wholly out of proportion with the attack. See the law as set out in the case of **MOHAMMED OMAR & 5 OTHERS (ibid)** that:-

Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary.

[27] Therefore, there would be no justification to use a panga to inflict such serious and multiple injuries on another human being in the name of self-defence. Similarly, his claim that he sought medical attention for injuries allegedly sustained from the alleged panga cuts inflicted by the deceased was unsubstantiated and not supported by any evidence. In fact, PW5 was categorical that when the accused was arrested and put in the cell there was no visible injury on him. On the basis of evidence adduced, the accused did not act in self-defence in the circumstances.

[28] Going back to the question I posed: did he therefore act with malice aforethought? Section 206 of the Penal Code defines circumstances which would amount to malice aforethought once proved by evidence. Emphasis has been that there must be intention to kill or cause grievous bodily harm for murder to be proved. I find the case of **DANIEL MUTHEE vs. R CA CRA NO 218 OF 2005 (UR)** to be of particular relevance to this case for it held that:-

When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code.

[29] In this case, the accused attacked the deceased with a panga and cut him several times on the head, ribs and hands. He must have known that attacking the deceased with a sharp instrument in such manner would cause death or grievous harm. I am satisfied therefore that malice aforethought was established in the sense of section 206 of the Penal Code. The deceased died out of the fatal injuries inflicted by the accused for no lawful reason. I find him guilty of murder contrary to section 203 of the Penal Code and convict him accordingly. It is so ordered.

Dated, signed and delivered in open court at Meru this 12th June, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Kinyua advocate for Mr. Namiti for State

Mr. Igweta advocate for accused

Accused – I understand Kimeru

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F. GIKONYO

JUDGE